FILED BY CLERK
FEB -9 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JONATHAN F., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and SELINA F., Appellees.	2 CA-JV 2010-0100 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J17126600

Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

Sanders & Sanders, P.C.
By Ken Sanders
Tucson
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona Department of Economic Security

---

B R A M M E R, Presiding Judge.

¶1 Jonathan F., father of Selina F., born in April 2004, appeals from the juvenile court's August 2010 order terminating his parental rights to his daughter based on the term of Jonathan's incarceration.[1] *See* A.R.S. § 8-533(B)(4). Jonathan raises numerous issues on appeal, including: (1) the court improperly determined future reunification services would be futile and changed the case plan goal to severance and adoption at the consolidated dependency disposition and permanency planning hearing; (2) there was insufficient evidence to support the court's termination order based on the length of incarceration; (3) the court improperly considered evidence of prior incarcerations; and (4) the court's minute entry ruling terminating Jonathan's parental rights did not comply with Rule 66(F), Ariz. R. P. Juv. Ct. For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent's rights if it finds by clear and convincing evidence that any statutory ground for severance exists and, by a preponderance of the evidence, that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

[1]Selina's mother, whose parental rights were also terminated, is not a party to this appeal.

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Child Protective Services (CPS) removed Selina from her parents' care and adjudicated her dependent in 2004, when she was less than one year old. Selina later was reunified with Jonathan and the dependency was dismissed. The following year, Jonathan was sentenced to two years' imprisonment related to a burglary conviction and Selina lived with her paternal grandmother. When he was not incarcerated, Jonathan was in the grandmother's home with Selina.

¶4 The Arizona Department of Economic Security (ADES) removed Selina from Jonathan's care a second time in January 2010, after it received reports that Selina had been hit by objects Jonathan had thrown at his girlfriend during a domestic violence incident. Jonathan again was incarcerated, pending trial for that incident and for a 2009 aggravated assault, and ADES initiated the dependency proceeding at issue here. In March 2010, Jonathan received a 2.5-year sentence with credit for 117 days served for aggravated assault. He admitted the allegations in the dependency petition, and Selina was adjudicated dependent as to him in April 2010.

¶5 At the May 2010 consolidated dependency disposition and permanency planning hearing, the juvenile court found reunification services would be "futile and inappropriate" in light of Jonathan's most recent, 2.5-year prison sentence and the mother's abandonment of Selina, and changed the case plan goal to severance and adoption over Jonathan's objection. ADES then filed a motion to terminate Jonathan's

rights based on length of incarceration, *see* § 8-533(B)(4), and neglect or willful abuse, *see* § 8-533(B)(2). Jonathan failed to appear at the contested severance hearing held in August 2010, and the court terminated his parental rights to Selina based on the length of his incarceration.

¶6 On appeal, Jonathan challenges the juvenile court's May 7, 2010, ruling, in which the court determined further reunification services would be futile, consolidated the dependency disposition hearing with the permanency planning hearing, and changed the case plan goal to severance and adoption. He contends the court committed legal error by ordering ADES to cease providing reunification services in the absence of any supporting evidence or express findings to support its decision. He also asserts the court's ruling denied him due process and violated A.R.S. § 8-846(B),[2] and Rule 57, Ariz. R. P. Juv. Ct.

¶7 But these arguments are not cognizable on appeal of the juvenile court's termination order. The court's May 7 ruling regarding reunification services, entered after a dependency disposition hearing, was a final, appealable order, from which Jonathan did not appeal. *See In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 374, 873 P.2d 710, 712 (App. 1994) (holding "juvenile court's order terminating visitation is a final order because it conclusively defines appellant's rights regarding

[2]Although ADES initially had asked for an expedited permanency hearing pursuant to A.R.S. § 8-846(B), the juvenile court granted its later motion to withdraw that request.

visitation of her children"). We therefore lack jurisdiction to consider his challenge to that ruling. *See Jared P. v. Glade T.*, 221 Ariz. 21, ¶ 14, 209 P.3d 157, 160 (App. 2009).

¶8 Similarly, to the extent Jonathan challenges the juvenile court's May 7 ruling changing the case plan goal to severance and adoption, that ruling, resulting from the permanency hearing, was an interlocutory, non-appealable order. *See Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 8, 1 P.3d 155, 158 (App. 2000) (order following permanency planning hearing interlocutory and not appealable). In *Rita J.*, we suggested such an order was analogous to a grand jury's finding of probable cause in a criminal case, subject to challenge by special action only, and only before the order "merged" with the final, appealable termination order. *Id.* ¶ 9. Because Jonathan did not seek special action relief or ask the court to reconsider its ruling, he has waived any review of the court's permanency hearing order.

¶9 Jonathan also argues insufficient evidence had been presented at the contested severance hearing to support termination based on the length of his incarceration,[3] asserting no evidence was presented regarding the factors identified in *Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.[4] Contrary to Jonathan's assertions,

[3]A.R.S. § 8-533(B)(4), provides that a court may terminate the rights of a parent convicted of a felony if the sentence "is of such length that the child will be deprived of a normal home for a period of years."

[4]As enumerated by our supreme court in *Michael J.*, the relevant factors a juvenile court should consider in determining whether a prison sentence is sufficiently long to satisfy § 8-533(B)(4) include, but are not limited to:

the juvenile court made findings at the termination hearing specifically addressing some of the *Michael J.* factors. Although it would be preferable for a juvenile court in every case to itemize and discuss each relevant factor in turn, its failure to do so does not necessarily result in error, nor is it particularly problematic here.

¶10 The record contains evidence, reviewed in detail in ADES's answering brief, pertaining to each of the factors identified in *Michael J.* We briefly summarize that evidence below.

¶11 With respect to the length and strength of the parent-child relationship when incarceration began, we can infer the juvenile court concluded Jonathan's relationship with Selina was not strong, based on Jonathan's lengthy incarceration history, which caused extended separations from Selina, and the testimony of a CPS case manager that Selina did not recognize Jonathan as her father, mention him, or ask for

---

> (1) The length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

him. In considering the degree to which the parent-child relationship could be continued and nurtured during incarceration, the court heard evidence that Jonathan and Selina had limited contact in the past and that Jonathan had failed to facilitate visitation with Selina during his previous incarcerations. We also may infer the court found it likely that Jonathan's incarceration would deprive Selena of a normal home in light of the numerous times Jonathan already had been incarcerated during Selina's childhood, and because she will be eight years old when his term of incarceration expires in 2012. Jonathan does not and cannot dispute that his sentence is for a period of years, or that Selena's mother, whose rights also were terminated, is not available to provide a normal home life. Finally, evidence supported a finding that Selena would not be deprived of a parental presence as a result of termination because she had bonded with one of her foster mothers and that both were proficient in sign language and thus able to meet her special needs as a deaf child. The court thus had before it abundant evidence not only that Selina would be deprived of a normal home because of Jonathan's incarceration, but that she basically was "blossoming" in the home of her foster mothers and is "in need of [the] permanency" that home is able to provide her.

¶12 Jonathan further claims the juvenile court relied improperly on extrinsic evidence in the form of "previously" heard testimony to support its termination finding. Because Jonathan did not object on this ground below, he has waived the right to do so on appeal. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (party may not fail to call court's attention to matter and urge

that as ground for reversal on appeal). Moreover, the record shows the court was presented with and considered exhibits and testimony aside from the challenged "extrinsic" evidence, the admissibility of which Jonathan does not challenge. Therefore, even assuming without deciding that the court erred by relying on "previously" heard testimony, we do not find prejudicial error on this record. In addition, to the extent Jonathan claims the court improperly relied on his prior periods of incarceration, we find no error. Such evidence was relevant to the first factor in *Michael J.*—the length and strength of the parent-child relationship when the current incarceration began. *See Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

¶13 Finally, Jonathan argues the juvenile court's signed order terminating his parental rights failed to comply with the specificity requirements of A.R.S. § 8-538(A) and Rule 66(F), Ariz. R. P. Juv. Ct. Section 8-538(A) provides that every order terminating parental rights "shall be in writing and shall recite the findings on which the order is based." Rule 66, governing termination adjudication hearings, provides in subsection (F) that all findings and orders must be in the form of a written, signed minute entry or order. If the court grants a request to terminate a parent's rights, subsection (F)(2)(a) further requires the court "to [m]ake specific findings of fact in support of the termination of parental rights." The court's signed minute entry order here arguably falls short of compliance with § 8-538(a) and Rule 66(F)(2)(a). It articulates that the court found by clear and convincing evidence "the State has proven the allegation . . . as it pertains to the father, pursuant to A.R.S. 8-533(B)(4), Incarceration," and that ADES

"presented overwhelming evidence that is it [sic] in the minor's best interest to terminate the father's parental rights, so that the minor may be free for adoption and permanency." Nonetheless, because Jonathan did not raise this issue below when the court could have amplified its findings, he has waived it on appeal. As stated in *Christy C.*, 214 Ariz. 445, ¶ 21, 153 P.3d at 1081:

> We generally do not consider objections raised for the first time on appeal. This is particularly so as it relates to the alleged lack of detail in the juvenile court's findings . . . . [A] party may not "sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal th[e] mere lack of a finding on that critical issue as a ground[] for reversal." Thus, this argument has been waived.

Id., quoting Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co., 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976) (citations omitted). Jonathan urges us not to follow the holding in *Christy* and attempts to distinguish the *Bayless* case, asserting that requiring counsel to request specific findings below would have placed her in the untenable position of making an argument contrary to Jonathan's wishes that his rights not be terminated.

¶14 We are not persuaded that counsel's having requested more detailed findings would have impaired Jonathan's position on appeal. Moreover, as the court in *Christy* noted, even if the juvenile court's findings were insufficient, "any error would have been harmless, and remand not required." *Christy C.*, 214 Ariz. 445, n.5, 153 P.3d at 1081 n.5. We reach the same conclusion here. Even though the court's written order

was not as thorough as it might have been, the court nonetheless made findings that addressed, to some extent, the factors set forth in *Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88. Based on the evidence presented, the court correctly concluded that Selina essentially had no prior relationship with Jonathan, who had not "been around to care for her"; there was no hope he would be able to provide a normal home for her in the future; and, she is thriving in her current placement. Notably, at the conclusion of the termination hearing, the court stated it would sign the minute entry "in lieu of a formal order, unless [the parties] want to submit a form of order." Jonathan did not request such an order.

¶15 Accordingly, we affirm the juvenile court's order terminating Jonathan's parental rights to Selina.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge